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HB 2051-82, HD 1 RELATING TO THE ENVIRONMENT

Statement for
House Committee on Finance
Public Hearing - 11 February 1982

By
Doak C. Cox, Environmental Center

HB 2051, HD 1 would make significant changes in functions of the Environmental Quality Commission, the Office of Environmental Quality Commission, the Office of Environmental Quality Control, and the Environmental Council. The composition and functions of these bodies, and changes earlier suggested, were reviewed last fall by the University of Hawaii Environmental Center in RG:0046, copies of which have been provided to your committee. This statement of the changes proposed in the current draft of this bill has been submitted for review to the Legislative Subcommittee of the Environmental Center. However, it does not reflect an institutional position of the University.

The provisions proposed in HB 2051, HD 1 are best reviewed as they pertain to:

1. Abolition of the Environmental Quality Commission and transfer of its responsibilities with respect to the State Environmental Impact Statement (EIS) system to the Office of Environmental Quality Control and the Environmental Council;
2. Changes in the structure and functions of the Environmental Council; and
3. Strengthening the OEQC.

Abolition of EQC and transfer of EIS system authority to the OEQC and Council

When the State EIS system was established, the system (including the authority to promulgate pertinent rules and regulations) was placed in the Environmental Quality Commission, especially created for this purpose although the Office of Environmental Quality Control (OEQC) and the Environmental Council already existed. The existence of the three bodies with similar names has created a good deal of confusion that can be reduced by the abolition of the Commission. Its responsibilities can be transferred to the other two bodies without weakening the EIS system.

Under HB 2051 the EIS-system administrative authority would be transferred to the Office of Environmental Quality Control. However, the bill would wisely transfer the Environmental Council rather than to the OEQC. The authority to hear appeals to

agency determinations regarding needs for EIS preparation and the acceptability of EIS's. Such determinations involve subjective judgements as well as technical information. Although the OEQC can supply the technical information, the Council will better represent the public in making the subjective judgements.

Changes in Council structure and functions

At present, the OEQC Director is the chairman of the Environmental Council. Under HB 2051, HD 1 the Director would remain an ex officio member of the Council, but the Council would elect its own chairman. The proposed change will decrease the likelihood that the Council will address only those issues that the Director wants it to address and that the Council will be unduly influenced by the Director's opinions.

In addition to the appeal function referred to above, HB 2051, HD 1 would add, to the functions of the Council, that to "determine and define the long range environmental goals of the State and exercise such direction of the OEQC to achieve such goals." Although the Council may quite appropriately advise on such goals, it is the Legislature that should establish them, and although the Council is expected to advise the OEQC Director on the achievement of such goals, it is the Director who must direct the OEQC. We suggest that this additional function should be deleted from the bill.

Strengthening the OEQC

Placed originally in the Office of the Governor, the OEQC was transferred two years ago to the Department of Health for administrative purposes. In this Department, the OEQC has languished. It no longer has an independent Director, and its staff has been depleted.

HB 2051 would transfer the OEQC to the Department of Budget and Finance. As recognized in Standing Committee Report No. 298-82 of the House Committees on Energy, Ecology and Environmental Protection and on Government Operations, the Department of Budget and Finance, unlike the Department of Health, would not be "faced with a conflict of interest where the administration of the OEQC and the Council are concerned." Hence with the proposed change the OEQC will be able to perform its duties better than with its present placement.

THE HAWAII OFFICE OF
ENVIRONMENTAL QUALITY CONTROL,
ENVIRONMENTAL COUNCIL, AND
ENVIRONMENTAL QUALITY COMMISSION--
BACKGROUND AND STATUTORY PROVISIONS

By
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Introduction

For its consideration at a public hearing held on 12 November 1981, in connection with possible changes in the placement of the Environmental Council and of the Office of Environmental Quality Control (OEQC) with which it is associated, the Council requested a review of the history of statutory provisions regarding the two bodies and of their background. This review covers also the Environmental Quality Commission, whose role is closely connected with those of the Council and OEQC, and it poses and discusses the implications of possible answers to a number of questions that should be addressed when possible changes in the placement of the three bodies are considered.

A draft of the review was made available to the Council prior to its hearing, and a briefer revision was presented at the hearing. The present version has been prepared for the use of such legislative committees as may be involved in the consideration of changes in the statutory provisions regarding the three bodies. Although testimony was presented at the Council's hearing implying answers to the questions posed, answers are not presumed in the review.

Background to the statute establishing the OEQC and Council

The establishment of the OEQC and Council resulted from the "environmental movement" that was manifest not only in Hawaii but even more strongly in parts of the mainland. Other results of the "movement" were the passage of the National Environmental Policy Act; the establishment of the Council on Environmental Quality, Environmental Protection Agency, and environmental impact statement system of the federal government, and similar actions in various mainland states. The process from which plans for the establishment of the Hawaiian institutions emerged began before the national institutions were established and before the first "Earth Day" was scheduled, and the plans were not developed in emulation of actions taken or to be taken elsewhere.

The process may be considered to have been initiated as a result of a symposium on the Impact of Technology on the Environment held in 1969 under the auspices of the Associated Students of the University of Hawaii. Discussions in the symposium reinforced opinions that Hawaii was not immune to the kind of environmental problems that were being recognized elsewhere, that the problems merited serious attention, and that even the University with its strengths in the many disciplines bearing on such problems was ill prepared to provide transdisciplinary guidance to attempts to cope with them. As a result, the Dean of the Graduate Division and Director of Research of the University established a rather large Committee on Ecology and Man to investigate what might be done within the University to provide appropriate guidance. The committee, recognizing early the environmental competence that was available in the various campuses and smaller units of the University, considered that the principal need was for some specific means for stimulation and coordination of environment-related University activities.

Initially restricted to the potential University role, the attention of the committee was broadened through the recognition of the Governor, John Burns, and then Senator Nadao Yoshinaga, that the state government also should prepare itself to cope better with the problems; and representatives of the Governor and the Senator were added to an executive committee of the Committee for Ecology and Man to formulate proposals for dealing with environmental problems at both State and University levels. Recognizing

that coping with environmental problems was not, and could not effectively be, the responsibility of a single State department, a coordinating mechanism was seen to be the principal need at the State as well as the University level. The result of the activities of the Executive Committee and its parent body was the preparation of a bill that was introduced in the 1970 session of the Legislature, was passed without significant opposition and very little change, and was approved by the Governor as Act 232.

This Act, the Environmental Quality Control Act, called for the establishment and support of the Office of Environmental Quality Control, the Environmental Council, and also the Environmental Center at the University.

Initial statutory provisions for OEQC and Council

Act 132 (1970) now Chapter 341 of Revised Laws of Hawaii, began with the following statements of finding and purpose:

The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The purpose of this chapter is to stimulate, expand and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

The Act called for placement of the OEQC in the Office of the Governor, for its service to the Governor "in an advisory capacity on all matters relating to environmental quality control," and for its implementation of the Act's provisions generally. The Act further provided that the OEQC was to be headed by a Director, who was to "have such powers delegated by the Governor as are necessary to coordinate, and when requested by the Governor, to direct pursuant to the Administrative Procedures Act all state governmental agencies in matters concerning environmental quality."

The Act also called for the establishment of the Environmental Council and provided that the OEQC Director was to be its Chairman and that its members, not to exceed 15 in number, were to include: "representatives from mass media, and representatives from relevant disciplines, for example, environmental design, natural, physical and social sciences, technologies, social ethics and philosophy, representatives of the university, representatives from business and industry, public and private schools and colleges, and voluntary community groups and associations."

In addition to more general authority, the Act provided that, with respect to the environment, the OEQC Director was to:

1. Direct problems to the attention of the University community through the Environmental Center and to residents of the State through the Council;

2. Develop a system for monitoring;
3. Conduct or arrange for the conduct of research;
4. Encourage acceptance of proposed legislative and administrative actions, and receive notice of complaints concerning problems through the Council;
5. Recommend long-range programs;
6. Recommend legislation;
7. Initiate public educational programs; and
8. Offer advice generally.

Background and statutory provisions for the Commission

In the establishment of the State Environmental Impact Statement (EIS) system and the Environmental Quality Commission overseeing the system, both the OEQC and the Council played definite although indirect roles.

On the advice of the OEQC Director, the Governor issued in 1971 an executive order establishing an EIS system applicable to actions proposed by state agencies, patterned more or less after the federal system established as required by the National Environmental Policy Act. Several bills were introduced in the 1973 legislative session calling for the establishment of a system with broader applicability. Action on them was deferred but, as recommended by the Council, the legislature passed a resolution calling for the establishment of a Temporary Commission on Environmental Quality. In its report, submitted in November 1973, the Temporary Commission provided drafts of several bills whose passage it recommended, including one relating to an expanded EIS system. This bill and four others relating to the same matter were considered by the 1974 legislature, and after amendment one was passed and approved by the Governor as Act 246.

Although, as submitted, the bill would have placed the responsibilities for developing EIS-system regulations and for hearing appeals on the acceptability of EIS's in the OEQC, as amended and passed, it called for the establishment of a separate Environmental Quality Commission and placed the responsibilities in this Commission. The Act, now Hawaii Revised Statutes, Chapter 343, "Environmental Quality Commission and Environmental Impact Statements," provided that the Commission, like the OEQC, was to be placed in the Office of the Governor. The Commission was to have ten members appointed by the Governor, including "representatives of labor, management, the construction industry, environmental interest groups, real estate groups, and the architectural, engineering, and planning professions" and, in addition, ex officio but voting, the OEQC Director. Its Chair was to be appointed by the Governor.

Amendments of initial statutory provisions

The environmental legislation enacted in 1974 included, not only Act 246, but also an Environmental Policy Act, much abbreviated from a version proposed by the Temporary Commission, and as an accompaniment, an Act calling for an enlargement

of the role of the Environmental Council. As provided by this act (Act 248, 1974), the Council, in addition to its other duties, was instructed to "monitor the progress of State, County, and federal agencies in achieving the State's environmental goals, and to make an annual report with recommendations for improvement to the governor, the legislature, and the public." All state and county agencies were required to "cooperate with the Council and assist in the preparation of such a report by responding to requests for information made by the Council."

The act for Environmental Quality Control was amended in 1978 to delete, from the responsibilities of the OEQC Director, the responsibility of developing a system of environmental monitoring, a function that has actually been performed by the Department of Health.

The acts relating to the OEQC, to the Council and to the Commission were amended in 1980 to shift both bodies from the Office of the Governor to the Department of Health for administrative purposes only. There have been other amendments of the EIS act, but these have affected only the coverage and operation of the EIS system and not the structure or functions of the Commission.

Questions relating to possible further amendments

Any consideration of further amendments to the statutory provisions for the OEQC, the Council, and the Commission should probably begin with the findings expressed in the Environmental Quality Control Act. If it were no longer true that "the determination of an optimal balance between economic development and environmental quality control deserves the most thoughtful consideration, and that the maintenance of the optimal quality of the environment deserves the most intensive care," there would seem to be no further need for the OEQC or the Council, or for the EIS system and the Commission that administers it. Indeed, it would seem that the Environmental Policy Act is without significance.

If, however, the findings are still valid, the next question to consider with respect to the OEQC is whether the maintenance of environmental quality is still a matter with which all state departments should be concerned and which requires interdepartmental coordination, or whether this is no longer the case.

If the coordinating role is no longer important, there is no reason why the OEQC should not be dissolved in favor of, or its role reduced to that of, an agency in whatever department is considered to be solely responsible for environmental quality. If the coordinating role is still important, there is the further question whether the role can be exercised best by the OEQC with its original placement in the Office of the Governor, with its present placement solely for administrative purposes in the Department of Health, or with its placement somewhere else, or by some other body.

The original Environmental Quality Control Act provided for both the establishment and the initial support of the position of the OEQC Director. Hawaii was fortunate in that, until recently, the continuing support for the position was actually provided by the Federal Environmental Protection Agency. As a consequence, no provision has been made in the state budget subsequently for the support of the position. The powers of the Director have now been delegated by the Governor to the Director of Health and by him to the Deputy Director for Environmental Programs. If the interdepartmental coordinating role and relatively independent status of the OEQC

remain important, it must obviously be questioned whether an independent Director should not again be appointed with support for the position provided in the budget.

Even if the position of the Director again becomes a separate one, some of the responsibilities remaining under the amended statute seem questionable, for example:

1. That to "institute public education programs"--a without reference to the functions of other departments for example the Department of Education; and
2. That to "encourage public acceptance of proposed legislative and administrative actions concerning ecology and environmental quality"--without qualification as to the merit of the proposals.

If the OEQC were to be abolished, there would seem little purpose to continuing the Council, and if it were to be placed other than solely for administrative purposes in some department, the Council's role might well be performed by some already existing body advisory to that department. If, however, the OEQC is to maintain its relatively independent status and its coordinating role, it should be considered whether the role can be wisely performed without the kind of external guidance that is provided by the Council.

Placement of the Council in the Office of the Governor was implied by the OEQC's original placement there and not specified by the Environmental Quality Control Act. Transfer of the Council to the Department of Health would seem implied by the 1980 amendment of the act transferring the OEQC there, but the amendment has been interpreted as not transferring the Council. Certainly if the guidance of the Council to the OEQC is still needed, the placement of the Council should be identical to that of OEQC.

Two questions, at least, should be considered with respect to the Council's functions:

1. Whether it should be responsible, as at present, for the preparation of the annual report on environmental quality--a function actually performed by the OEQC; and
2. Whether it should be chaired by the OEQC Director and meet only at his call, as now provided, or whether it should select its own Chair (or the chair should be appointed by the Governor) and it should meet on the call of either the Chair or the Director.

In considering possible amendments to the statutory provisions regarding the Commission, it seems desirable at the outset to recognize that, in one respect, the Commission resembles the combination of the OEQC and the Council. It is an executive agency like the OEQC, but one that is composed of members appointed from the public like the Council. It was clearly the intent of the 1974 legislature not to place in the OEQC the powers with respect to the EIS system that were placed in the Commission. However, now that the system has been in use for several years, it would seem appropriate to consider again whether the responsibility for operation of the system might not be placed in the OEQC and the responsibility for making policy changes in the operation of the system (within the statutory provisions) might not be placed in the OEQC with the advice of the Council or in the Council itself.

Concluding remarks

In considering possible amendments to the statutory provisions relating to the OEQC, the Council, and the Commission, their performance should be, and no doubt will be taken into account. I do not intend to comment in detail on their performance. However, brief comment seems warranted, because some aspects of the performance as well as the prescription of their functions have sometimes been characterized as representing overreactions to environmental problems, disregarding economic aspects.

Let me refer again to the aim indicated in the Environmental Quality Control Act to achieve "an optimum balance between economic development and environmental quality." Unquestionably, the optimization of this balance requires tradeoffs between immediate economic gain and preservation of natural environmental qualities. However, in the performance of the three bodies there is no evidence of environmental extremism or disregard of economic benefits. There have been cases of proposed environmental management actions that were proposed, not only by environmental concerned members of the public, but by governmental agencies; that would have been extremely costly; that might be environmentally sound in some environment, but not in our tropical, oceanic islands; and that were avoided principally through the coordinating efforts of the OEQC backed by the Council. Through their efforts we were spared the expenditure of millions of tax dollars to achieve supposed environmental benefits that would not, in fact, have been produced.

I suggest that in considering possible amendments to the statutory provisions relating to the three bodies, their performance should be judged in terms of the optimum balance described in the Environmental Quality Control Act, in other words in terms of overall, long-term human welfare in Hawaii.